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November 9, 1993

BY OVERNIGHT MAIL

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: PP Docket No. 93-253

Dear Mr. Caton:

Enclosed for filing please find an original plus nine (9) copies of the Comments of Rochester Telephone Corporation in the above-docketed proceeding.

To acknowledge receipt, please affix an appropriate notation to the copy of this letter provided herewith for that purpose and return same to the undersigned in the enclosed self-addressed envelope.

Very truly yours,

Michael J. Shortley, III

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Section 309(j)
of the Communications Act

Competitive Bidding

PP Docket No. 93-253

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COMMENTS OF ROCHESTER
TELEPHONE CORPORATION

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Summary

Rochester^{*/} submits these comments in response to the Commission's Notice initiating this proceeding. The Commission seeks comment as to which services should be subject to the auction process made available to the Commission under the Budget Act and the manner in which the Commission should conduct auctions.

First, Rochester generally agrees with the Commission's definitional approach in determining which services should be subject to auctions. The requirements contained in the Act for mutual exclusivity and offering services to subscribers for a fee are relatively clear. To the extent that a service meets these criteria, the Commission should utilize its auction authority. The Commission, however, should not adopt its proposal with respect to intermediate links. Providers utilize such links to provide their services to end users. These links -- for example, a microwave hop connecting a cell site to a mobile telephone switching office -- are not themselves offered to end user subscribers and thus do not qualify for auctioning. Moreover, the use of auctions for such frequencies could wreak havoc with a provider's ability to offer service to the public.

^{*/} The abbreviations used in this summary are defined in the text.

Second, the Commission should design auction procedures that facilitate the rapid deployment of new services, yet avoid undue concentration of ownership. In general, the Commission should utilize oral auctions as the principal means of awarding licenses. In certain circumstances, a combination of sealed bids and oral auctions may be appropriate. The Commission should permit bids for groups of licenses only in narrowly-defined circumstances. In particular, the Commission should not accept bids for the licenses to a particular frequency block -- e.g., Blocks A and B -- for PCS for all of the MTAs, as proposed. At most, the Commission should permit multiple bids for those frequency blocks that it will license at the BTA level for those BTAs within an MTA. The Commission should also permit multiple bids within a service territory designed to aggregate spectrum, i.e., bids for more than one frequency block up to Commission-mandated limits within the affected service area.

The Commission must also establish clear guidelines governing group behavior. It should not, in the first instance, permit consortium bidding. Group bidding could result in the lack of mutually exclusive applications, which would defend the purpose of the auction process in the first instance. Although other laws exist to prevent or punish

unlawful collusive conduct, the Commission should exercise independent authority to determine licensee qualifications by disqualifying offending parties from participating in future auctions.

Third, the Commission should establish relatively stringent, but not punitive, up-front payments. Its proposal to require a deposit of two cents per megahertz per population is reasonable. However, the Commission should decline to adopt its proposal to require an immediate lump sum payment. Rather, the Commission should permit licensees to pay the fee over a time period directly related to any required construction schedule. A penalty for failure to adhere to construction requirements, absent extenuating circumstances, should include not only revocation of the license, but also forfeiture of all funds paid to date.

Fourth, the Commission should tread warily in the area of preferences. The Commission's goal should be to ensure an equal opportunity for minorities and women, small businesses and rural telephone companies. However, it should not award direct preferences. Moreover, the Commission has decided to reserve selected PCS frequency blocks for designated entities. That action alone should suffice to ensure participation in PCS by designated entities. Additional protections are unnecessary and unwarranted.

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Implementation of Section 309(j)
of the Communications Act)

Competitive Bidding)

PP Docket No. 93-253

COMMENTS OF ROCHESTER
TELEPHONE CORPORATION

Introduction

Rochester Telephone Corporation ("Rochester") submits these comments in response to the Commission's Notice^{1/} initiating this proceeding. The Commission seeks comment as to which services should be subject to the auction process made available to the Commission under the Omnibus Budget Reconciliation Act of 1993 ("Act") and the manner in which the Commission should conduct auctions.

First, Rochester generally agrees with the Commission's definitional approach in determining which services should be subject to auctions. The requirements contained in the Act for mutual exclusivity and offering services to subscribers for a fee are relatively clear.^{2/} To the extent that a service

^{1/} Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Dkt. 93-253, Notice of Proposed Rulemaking, FCC 93-455 (Oct. 12, 1993) ("Notice").

^{2/} Notice, ¶ 11.

meets these criteria, the Commission should utilize its auction authority. The Commission, however, should not adopt its proposal with respect to intermediate links.^{3/} Providers utilize such links to provide their services to end users. These links -- for example, a microwave hop connecting a cell site to a mobile telephone switching office -- are not themselves offered to end user subscribers and thus do not qualify for auctioning. Moreover, the use of auctions for such frequencies could wreak havoc with a provider's ability to offer service to the public.

Second, the Commission should design auction procedures that facilitate the rapid deployment of new services, yet avoid undue concentration of ownership. In general, the Commission should utilize oral auctions as the principal means of awarding licenses. In certain circumstances, a combination of sealed bids and oral auctions may be appropriate. The Commission should permit bids for groups of licenses only in narrowly-defined circumstances. In particular, the Commission should not accept bids for the licenses to a particular frequency block -- e.g., Blocks A and B -- for personal communications services ("PCS") for all of the major trading areas ("MTAs"), as proposed.^{4/} At most, the Commission should

^{3/} Notice, ¶ 29.

^{4/} Id., ¶ 120.

permit multiple bids for those frequency blocks that it will license at the basic trading area ("BTA") level for those BTAs within an MTA. The Commission should also permit multiple bids within a service territory designed to aggregate spectrum, i.e., bids for more than one frequency block up to Commission-mandated limits within the affected service area.

The Commission must also establish clear guidelines governing group behavior. It should not, in the first instance, permit consortium bidding. Group bidding could result in the lack of mutually exclusive applications, which would defeat the purpose of the auction process in the first instance. Although other laws exist to prevent or punish unlawful collusive conduct, the Commission should exercise independent authority to determine licensee qualifications by disqualifying offending parties from participating in future auctions.

Third, the Commission should establish relatively stringent, but not punitive, up-front payments. Its proposal to require a deposit of two cents per megahertz per population^{5/} is reasonable. However, the Commission should decline to adopt its proposal to require an immediate lump sum

^{5/} Id., ¶ 102.

payment.^{6/} Rather, the Commission should permit licensees to pay the fee over a time period directly related to any required construction schedule. A penalty for failure to adhere to construction requirements, absent extenuating circumstances, should include not only revocation of the license, but also forfeiture of all funds paid to date.

Fourth, the Commission should tread warily in the area of preferences. The Commission's goal should be to ensure an equal opportunity for minorities and women, small businesses and rural telephone companies. However, it should not award direct preferences. Moreover, the Commission has decided to reserve selected PCS frequency blocks for designated entities.^{7/} That action alone should suffice to ensure participation in PCS by designated entities. Additional protections are unnecessary and unwarranted.

Argument

I. THE COMMISSION SHOULD GENERALLY UTILIZE AUCTIONS WHERE PERMITTED.

Subject to the conditions described in Part II, infra, the Commission should encourage the use of auctions as a means of allocating spectrum. Properly designed auctions will help ensure that the Commission allocates spectrum to those entities that place the highest value on such spectrum. Auctions should

^{6/} Id., ¶ 26.

^{7/} Id., ¶ 121.

also provide powerful incentives to auction winners to deploy systems that will bring service to the public expeditiously. The Commission has properly defined, with two notable exceptions, those services that should be subject to the auction process. With these two exceptions, which are discussed below, the Commission may readily make the findings required by the Act for the implementation of competitive bidding.^{8/}

The Commission should not adopt its proposal to subject frequencies used as intermediate links to the auction process.^{9/} Such facilities do not qualify under the Act for competitive bidding and subjecting those frequencies to the auction process would be extremely counterproductive.

Many service providers -- including exchange carriers and cellular providers -- utilize intermediate links in the internal operations of their networks. Cellular carriers, for example, utilize microwave facilities to connect cell sites with mobile telephone switching offices. While the Commission is correct that such facilities are integral to the operation of a network,^{10/} the Commission is incorrect in concluding that these frequencies be subject to auction. Those frequencies

^{8/} 47 U.S.C. §§ 309(j)(2)(A), (B).

^{9/} Notice, ¶ 29.

^{10/} Id.

themselves are not offered to paying subscribers. They are merely used for the provision of a service, e.g., cellular, that is. Thus, although the cellular spectrum -- if it otherwise qualifies -- may be subject to competitive bidding, the microwave frequencies used as intermediate links are not. Thus, under the statutory criteria, it is not at all clear that applications for these frequencies are subject to auctions.

Moreover, it would make no sense to auction these frequencies. Subjecting microwave applications to competitive bidding could wreck havoc with providers' plans to offer their services to the public. If microwave applications for internal network uses were subject to auction, the opportunities for gamesmanship are heightened. Competitors could file mutually exclusive applications for the sole purpose of delay. This result is totally unwarranted.^{11/}

^{11/} For the same reasons, the Commission should not adopt its proposal (id., ¶¶ 165-66) to subject applications for Basic Exchange Radio Telephone Service to auctions. Rural exchange carriers utilize these frequencies to provide basic telephone service. Use of these frequencies does not, of itself, constitute an independent service offering.

Moreover, such a result would be unnecessary. The Commission may receive the full value of the spectrum by auctioning the underlying spectrum used by a provider to offer services to end users. To the extent that cellular and PCS frequencies are auctionable, potential bidders will necessarily take into account the additional spectrum that they may need for the internal operations of their networks in bidding for the underlying frequency. Subjecting intermediate links to auctioning is both unnecessary and counterproductive.

The Commission should also not adopt its principal use definition. The Commission proposes to define principal use on a service-by-service basis.^{12/} Point-to-point microwave -- which may also be used to provide service directly to end users -- may comprise an integral part of the internal operations of a communications network. The same is undoubtedly true of certain other services as well. In these circumstances, the Commission should best determine whether applications should be subject to the auction process on a case-by-case basis. Applications for discrete facilities that are strictly for internal network uses should not be subject to auctions.

^{12/} Id., ¶¶ 32-33.

II. THE COMMISSION SHOULD INSTITUTE
REASONABLE AUCTION PROCEDURES
DESIGNED TO FACILITATE THE
GOALS ESTABLISHED BY CONGRESS.

The auction procedures that the Commission establishes should both facilitate the rapid deployment of service by licensees and avoid the undue concentration of license ownership. To this end, the Commission should: (a) utilize oral auctions in most circumstances; (b) permit only minimal aggregation of bids by individual entities; and (c) preclude consortium bidding in the first instance and establish clear guidelines regarding permissible collaborative behavior.

A. The Commission Should Utilize
Oral Bidding in Most Circumstances.

Except in circumstances that warrant a different approach, the Commission should utilize oral bidding as the primary method of conducting auctions. Absent collusion, oral bidding represents the most efficient process for conducting auctions. The oral bid process is relatively quick and fairly establishes the market price for the spectrum in question. As the Commission correctly notes,^{13/} other bidding systems possess their own disadvantages. Thus, unless some version of combinatorial bidding is warranted, the Commission should

^{13/} Id., ¶¶ 40-45.

utilize the ascending order process of oral bidding.^{14/}

B. The Commission Should Permit
Multiple Bidding Only in
Carefully Prescribed Circumstances.

In general, the Commission should not permit bidders to aggregate licenses across large geographic areas. This type of aggregation is not necessary to assure expeditious delivery of service to the public and could result in undue concentration of spectrum ownership. Specifically, the Commission should not accept multiple bids for the 102 Blocks A and B PCS licenses.^{15/} This approach would do no more than freeze-out smaller applicants that may be capable of serving a single service area but that lack the financial resources to commit to providing service to large portions of the country.

The Commission's expressed concern regarding minimum efficient size and interconnection -- were it to decline to permit aggregate bids of this magnitude^{16/} -- are unfounded. As the history of cellular service demonstrates, multiple licensees serving different geographic areas may interconnect with each other and with the public telephone network to provide service to their subscribers. Moreover, the Commission

^{14/} A combination of sealed bids and oral auctions may well be appropriate in those circumstances where the Commission permits bidding for multiple licenses. The Commission's proposal (id., ¶ 58) to utilize sealed bids for multiple licenses and oral bids for the individual licenses appears workable.

^{15/} Id., ¶ 120.

^{16/} Id., ¶ 57.

has established policies that guarantee a federal right of interconnection.^{17/} There is simply no necessity to accept bids on a multiple MTA basis.

There are, however, circumstances in which the Commission should accept multiple bids. For example, for those PCS frequency blocks that the Commission will license at the BTA level, the Commission should permit applicants to bid for multiple BTA licenses within a single MTA.^{18/} Similarly, the Commission should permit bidders to submit multiple bids in order to aggregate spectrum -- up to permissible limits -- in specific market areas.^{19/} These types of multiple bids may permit potential service providers to acquire sufficient spectrum in order to offer economically attractive services in an efficient manner. However, because these types of aggregation are relatively limited, the concerns that smaller potential service providers could be frozen out of the process are highly attenuated.^{20/} Thus, there is no reason for the Commission to preclude these limited forms of multiple bidding.

^{17/} Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Report No. CL-379, Declaratory Ruling, 63 RR 2d (P&F) 7, 20-22, ¶¶ 21-22 (1987).

^{18/} Notice, ¶ 123.

^{19/} Id., ¶ 124.

^{20/} If the Commission permits this type of aggregation, it should permit bidders, if they so choose, to condition their bids on obtaining a certain number of BTA licenses or a specified amount of spectrum in a given service area.

C. The Commission Should Not Permit Consortium Bidding.

Permitting bids by consortia, as the Commission obliquely suggests,^{21/} could have undesirable consequences.^{22/} This type of group bidding could result in the lack of mutually exclusive applications. For example, all potential bidders for a given license could form a consortium and that consortium itself could submit the only bid. Because the existence of mutually exclusive applications is a prerequisite to competitive bidding, permitting consortia to file applications could defeat the purpose of Congress in permitting competitive bidding in the first instance.

Moreover, permitting consortium bidding would provide a convenient vehicle to facilitate the very collusion that the Commission wishes to discourage. Loosely-defined consortia would permit potential bidders to agree on the terms of their bids in advance. As such, consortium bidding would encourage

^{21/} Id., ¶ 93.

^{22/} "Consortia" are not defined in the Notice. Rochester assumes that the Commission means something more than legally recognizable entities -- such as individuals, corporations and partnerships. In this section of its comments, Rochester is not suggesting that partnerships not be permitted to participate in competitive bidding for licenses. It suggests that the Commission limit the ability to participate in auctions to legally recognized entities.

the type of collusive conduct that would defeat the purpose of the Act.

Although other statutes exist that address and punish collusion,^{23/} those statutes are largely criminal in nature. Thus, the enforcement authorities would need to prove guilt beyond a reasonable doubt. While that standard is appropriate in a criminal prosecution, it is overly strict for the purpose of determining the qualifications of entities to hold Commission licenses. Rather than rely upon criminal statutes and the prosecutorial discretion of other agencies, the Commission should exercise its independent authority to police collusive conduct by disqualifying offending parties from participating in future auctions.

Permitting consortium bidding could also make it more difficult for the Commission to determine licensee qualification. The Commission could well need to sort through the various consortium arrangements to satisfy itself that a consortium, as such, is legally and financially qualified. These problems do not exist -- at least to the same degree -- in the review of applications filed by legally recognized entities, such as individuals, corporations and partnerships.

^{23/} Id., ¶ 94.

III. THE COMMISSION SHOULD REQUIRE
STRINGENT, BUT NOT PUNITIVE,
UP-FRONT PAYMENTS.

The Commission correctly recognizes that it should require reasonable deposits to preclude financially unqualified entities from submitting bids.^{24/} At the same time, however, the Commission must also recognize that winning bidders will require capital to construct and operate their systems. The Commission's requirement that applicants submit a deposit of two cents per megahertz per population^{25/} is reasonable. A deposit of this magnitude will likely be sufficient to deter speculative applications. Moreover, this proposal has the merit of relating the size of any deposit to the market-determined value of the license.

However, the Commission should not adopt its proposal to require an immediate lump-sum payment by the winning bidder.^{26/} Rather, the Commission should tie the payment for a license to the construction schedule applicable to a particular service. This approach would permit licensees to conserve the capital that they will require for the construction and operation of their systems. Nonetheless, in order to

^{24/} Id., ¶ 102.

^{25/} Id., ¶ 102.

^{26/} Id., ¶ 68.

obtain the revenues promised by the winning bidder, the Commission should condition continued license authority on the licensee adhering to a payment schedule, as well as a construction schedule. Similarly, the Commission's rules could provide that all payments made by winning bidders are nonrefundable.

IV. THE COMMISSION SHOULD TREAD
WARILY IN THE AREA OF PREFERENCES.

The Act requires the Commission to consider means of encouraging the participation of minorities and women, small businesses and rural telephone companies in the provision of services which require licenses that would be awarded through competitive bidding.^{27/} Nonetheless, the Commission should approach this area with care. As the Commission correctly observes,^{28/} existing case law suggests that such preferences must be narrowly-tailored and designed to further a legitimate public interest.^{29/} Moreover, the Commission must base any such preferences on the existence of a convincing record demonstrating their need.^{30/}

^{27/} 47 U.S.C. § 309(j)(4)(D).

^{28/} Notice, ¶¶ 73-74.

^{29/} E.g., Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).

^{30/} E.g., Metro Broadcasting v. FCC, 497 U.S. 547 (1990).

Thus, any scheme of preferences that the Commission adopts should be narrow and specifically targeted to the groups intended to benefit thereby. The Commission's proposal to set aside a certain amount of PCS spectrum for designated entities should adequately address Congress's concerns. Additional preferences are unnecessary and would be susceptible to equal protection challenges.^{31/}

^{31/} If the Commission retains its set-aside, it should expand the class of rural telephone companies that would qualify to bid on the set-aside spectrum. Its proposal to utilize the standard for applicability of the rural exemption from the cable-telco cross-ownership rules (Notice, ¶ 77) is unduly narrow. As Rochester explained in its Video Dialtone comments (see Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Dkt. 87-266, Comments of Rochester Telephone Corporation (Oct. 8, 1992)), the Commission should raise the rural exemption to 25,000 access lines. Those reasons apply equally here. See also Notice, ¶ 74 n.54 (noting OPATSCO's request to utilize a 10,000 access line ceiling in the context of PCS licensing).

Conclusion

For the foregoing reasons, the Commission should design its competitive bidding procedures consistent with the suggestions contained herein.

Respectfully submitted,



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